UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

THOMAS R. RICCI, ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID M. RICCI, ET AL.	)	
PLAINTIFFS	)	
v.	)	**Civil No. 98-364-P-H**
ALTERNATIVE ENERGY, INC., ET AL.,	)	
DEFENDANTS	)	

ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Evidentiary issues and burden of proof determine the outcome of this diversity of citizenship case, a wrongful death action on behalf of a biomass stack inspector who fell to his death at the Beaver Plant in Livermore Falls, Maine. No one saw the incident. Because the plaintiffs cannot meet their burden of proof on what caused the fall, I grant summary judgment on behalf of the defendants.

Viewing the evidence in the light most favorable to the plaintiffs, a jury might find the following. David Ricci, an employee of Eastmount Environmental, Inc., went to the Beaver Plant owned by Beaver Plant Operations, Inc. in Livermore Falls on August 26, 1996. The worker who should have been with him went by mistake to a plant owned by International Paper Company in Jay, Maine. David Ricci therefore proceeded to conduct the prescribed inspection of the biomass stack by himself. No one observed him. When Ricci's co-worker showed up late, he found Ricci's body lodged in a crevice about two feet to the left of the ladder and some eighty-two feet below the

catwalk. Spatters of blood, hair and tissue were found on the adjacent precipitator roof and nearby locations. From the fact that his gloves and toolbox were discovered seventy feet up the stack on a catwalk, a jury could conclude that Ricci climbed the stack ladder. From the fact that a safety device that ascends and descends the middle rail of the stack ladder was found at waist height above the catwalk and that Ricci was wearing an undamaged safety harness that could connect to it, a jury could conclude that Ricci used the safety device to ascend the ladder to the catwalk and then disconnected from it. From the fact that at least some testimony places Ricci's toolbox about eight feet from an opening where the ladder ascends into the catwalk, a jury could conclude that Ricci got off the ladder and onto the catwalk. The opening through which the ladder passes into the catwalk was admittedly unguarded, although design specifications called for chains to surround it. The plaintiffs would have a jury infer from evidence that Ricci always wore his gloves while climbing, that he was not climbing when he fell and must have inadvertently stepped into the unguarded hole while conducting his inspection. The defendants challenge the admissibility of this evidence and argue that in any event the cause of the accident remains speculative. The plaintiffs would also have a jury infer from evidence that Ricci was very safety-conscious, that his fall must have been caused by the unguarded hole.

The person who trained Ricci signed an affidavit whose relevant part states: "Mr. Ricci was a thoughtful, methodical and careful person, and I considered him to be highly safety-conscious in his work." Exh. A to Aff. of Anthony M. Stratton. I conclude that this is classic character evidence under Rule 404 and not habit evidence under Rule 406. Consequently, it is inadmissible. Moreover, even if it were admissible, it would not change the result in this case.

Ricci's father testified at deposition and stated in his affidavit that his son was very meticulous about his hands, that approximately two or three months before the fatal accident he

purchased Ricci a new set of work gloves and that Ricci told him that he "never climbed ladders without using gloves." Aff. of Thomas R. Ricci at ¶ 7; Dep. of Thomas R. Ricci at 34, 38-39. The defendants contend that this is inadmissible hearsay. The plaintiffs contend that it is admissible under either Rule 803(3) or Rule 807.

The hearsay statement about glove usage attributed to David Ricci appears to be habit evidence under Rule 406. Rule 803(3) excepts from the hearsay rule testimony about intent, plan, motive or design. It does not specifically except habit evidence. Arguably, however, when a person says that his habit is "never" to do something, that is equivalent to a statement of intent or design. Alternatively, the hearsay might come in under Rule 807, for arguably it meets the same criteria of reliability as justify the 803(3) present mental state exception.

I need not resolve the evidentiary question, however, for even if the evidence is admissible, the plaintiffs do not have enough to get to a jury. The defendants contend that however tragic the event, a jury could only speculate to determine what happened. Specifically, they contend that a jury could not find it more probable than not that Ricci fell into the opening due to the lack of a safety chain (or any other negligent act or product defect for which the defendants might be liable),[1] and present a number of other alternative possibilities. If there is one equally likely causation for which the defendants are not responsible, then the plaintiffs have not met their burden of proof. I need not deal with all the possibilities the defendants suggest (for some of which the burden actually may lie

[1] The plaintiffs made some allegations that some of the defendants owed Mr. Ricci a duty to instruct him in the proper way to climb the particular stack at Livermore Falls and a duty not to let him climb alone. They have not seriously pressed an argument that some breach of those duties caused the accident in question. The heart of the matter—and the plaintiffs took this position at oral argument—is the factual question whether it is more likely than not that Mr. Ricci was not on the ladder the instant before he fell. The plaintiffs effectively have conceded that if Mr. Ricci was as likely as not upon the ladder right before he fell, the defendants are entitled to summary judgment.

with the defendants), for I conclude that there is at least one possibility that is equally likely to the plaintiffs' claim. Specifically—even with evidence that Ricci always wore his gloves while climbing and that his gloves and toolbox were found on the catwalk and inferring, therefore, that he had at some point dismounted from the ladder—Ricci could have been back on the ladder, about to engage his safety harness and planning to put his gloves back on for the descent when he fell. Some of the other equipment for the job was located at the base of the ladder, and Ricci's gloves were discovered within reach of the ladder.[2] The father's testimony that David Ricci always wore his gloves while climbing does not address whether he removed his gloves to clip the D-ring on his safety belt to (or unclip it from) the ladder safety device. (Indeed, there is other testimony that it is difficult to uncouple the safety device with gloves on.)

The plaintiffs have an expert who would testify, if allowed, that two-thirds of all construction falls involve a fall through a hole. Assuming that is correct, it has no bearing on how Mr. Ricci came to fall through the hole in question. (Contrary to the plaintiffs' suggestion, the evidence of record is not that two-thirds of falls through a hole result from the hole being unguarded; the evidence is that two-thirds of falls in the construction industry involve falls through a hole. See Dep. of John Orlowski at 157.) The expert would also testify that the correct way to engage the safety device is to stand with feet astride the hole (28 inches by 30 inches) rather than to get on the ladder first before engaging the safety device. There is no evidence presented, however, that this is what Ricci did or that this was his habit.

[2] The plaintiffs suggest that the gloves were "two to four" feet from the ladder, Pls.' Stmt. of Facts at ¶ 15A, but the record evidence they cite in support does not establish such a distance. The defendants offered a counterstatement, pointing to record evidence that the gloves could be reached by a person on the ladder. See Defs.' Resp. to Pls.' Stmt. of Facts at ¶ 15A.

Therefore, even if I assume that a jury could find from the habit evidence concerning gloves that Ricci was not actually descending the ladder without his gloves to obtain equipment at the bottom, a jury would still have to speculate to reach the conclusion that he fell into the hole inadvertently for lack of a chain guard rather than that he had positioned himself on the ladder within the opening to descend the ladder and fell before he was able to engage his safety device. If the probabilities are evenly matched, the plaintiffs cannot prevail.

Accordingly, the defendants' motions for summary judgment are **GRANTED**. All other pending matters are accordingly **MOOT**.

SO ORDERED.

DATED THIS 2ND DAY OF JULY, 1999.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE